

- A **MALAYSIA NATIONAL INSURANCE BHD**
- v.
- ROSZANNA ROSLI**
- B HIGH COURT SABAH & SARAWAK, KUCHING
RHODZARIAH BUJANG JC
[CIVIL APPEAL NO: 12-44-2009-II]
20 NOVEMBER 2009
- C ***INSURANCE: Motor insurance - Loss or damage to car - Claim for - Whether case fell under exception to liability of insurance policy - Whether insurance company liable for loss caused by act of cheating/criminal breach of trust - Distinction between theft and cheating - Penal Code, ss. 378, 415***
- D The respondent sued the appellant, an insurance company, under a comprehensive insurance policy when her car, the subject matter of the policy, went missing from a workshop where she had sent it for spraying. It was not disputed that the workshop had released it to a person who claimed to be an agent of the respondent's husband but who was in actual fact not. The appellant denied liability and submitted that this case fell under an exception to liability under section A para 4(e) of the insurance policy which provides that the appellant would not be liable for any loss caused by or attributed to the act of cheating/criminal breach of trust by any person within the meaning of the definition of the said offences under the Penal Code. The Sessions Court Judge found for the respondent and gave judgment for her in the sum of RM94,499.80 but out of that amount, the appellant was only to pay RM50,000 being the insured sum. The balance of the judgment sum was to be paid by the workshop (sued as the second defendant in the Sessions Court) where the car was sent. The insurance company filed an appeal against the decision of the Sessions Court Judge. The sole issue that arose was whether the exception to the policy applied in this case.
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- H **Held (allowing the appeal; setting aside part of Sessions Court Judge's decision ordering the appellant to pay RM50,000 of the judgment sum; the second defendant to bear the full brunt of the judgment sum of RM94,499.80):**
- I (1) Someone had impersonated the respondent's husband in order to persuade one Dave Cassidy to release the car to 'his friend.' That fell squarely within the definition of cheating in s. 415(a)

of the Penal Code. By taking away the respondent's car out of the possession of the workshop's employee, Dave Cassidy, the said 'Stephen' had dishonestly taken the car which was entrusted to Dave Cassidy at that material time but it was not theft because it was taken with Dave Cassidy's consent, given upon the deception played by the person who called Dave Cassidy earlier to release the car to 'his friend' Stephen. Thus the one obvious and very crucial distinction between theft and cheating was the element of deception present in the latter which was so apparent from the facts of this appeal. (paras 10-12)

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- (2) The Sessions Court Judge's findings that cheating had not been proven on a balance of probability went against the grain of the evidence which he later found, which was that the car was released by Dave Cassidy unlawfully to a third party who was not authorised by the respondent which infact was done by Dave Cassidy upon the deception played by that third person. This last finding was supported by the evidence adduced at the trial, in particular that of Dave Cassidy and on a balance of probability therefore the loss was due to an act of cheating by a third party. The words in the exception clause was clear and unambiguous and the *contra preferentum* rule need not apply. It says 'cheating/criminal breach of trust by any person ...' so the act of cheating need not be attributed to the insured only (or her husband in this case). (para 16)

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Legislation referred to:

Penal Code, ss. 378, 415(a)

For the appellant - Andy Tan; M/s David Allan Sagah & Teng Advocates

For the respondent - Francis Teron (Shankar RP Asnani with him); M/s Thomas, Shankar Ram & Co

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Reported by Suhainah Wahiduddin

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JUDGMENT

Rhodzariah Bujang JC:

[1] The respondent who was the plaintiff in the lower court sued the appellant, an insurance company under a comprehensive insurance policy when her car, the subject matter of the policy, went missing from a workshop where she had sent it for spraying.

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A It was not disputed that the workshop had released it to a person who claimed to be an agent of the respondent's husband but who was in actual fact not.

[2] The appellant denied liability along two lines of defence.

B (1) The facts of this case fell under an exception to liability under s. A para. 4(e) of the insurance policy which provides that the appellant would not be liable for any loss caused by or attributed to the act of cheating/criminal breach of trust by any person within the meaning of the definition of the said offences under the Penal Code. I pause here to add that loss by theft is covered by the policy.

C (2) The respondent has breached condition 2(f) of the insurance policy which provides that no repairs may be authorized to the vehicle without the prior written consent of the appellant.

D [3] The learned Sessions Court Judge found for the respondent and gave judgment for her in the sum of RM94,499.80 but out of that amount, the appellant was only to pay RM50,000 being the insured sum. The balance of the judgment sum was to be paid by the workshop (sued as the 2nd defendant in the Sessions Court) where the car was sent.

E [4] Only the insurance company filed an appeal against the decision of the learned Sessions Court Judge. At the hearing of the appeal, the appellant's counsel, in his written submission stated that his appeal is based on the sole issue of whether the exception to the policy as mentioned earlier applies in this case.

The Sessions Court's Judgment

G [5] The learned Sessions Court Judge correctly stated that the burden lies on the appellant to prove that the loss in this case was due to cheating or criminal breach of trust. He then found that both these offences were not proved as the appellant had failed to call the relevant witnesses to prove the content of the final adjuster report in which the loss adjuster drew the conclusion that the exception applied in this case. This report appears at pp. 244-253 of the appeal record with the annexures running until p. 292 of the said record.

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[6] Before me, Mr. Andy Tan for the appellant, submitted that the loss was clearly due to cheating as defined in the Penal Code and that for the exception in the policy to apply, it does not require the offence of cheating to be by the respondent or her husband. This is because the exception clause provides for cheating/criminal breach of trust by “anyone”.

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[7] Now examining the facts in this case and the sequence of events that happened, they show that the vehicle was entrusted to the workshop for spraying and touch up by the respondent’s husband. Then someone who claimed himself to be the respondent’s husband called and convinced the workshop’s employee by the name of Dave Casidy to release the vehicle to ‘his friend’ Stephen. This ‘Stephen’ came and took the car away – never to be seen again. Dave Casidy was not implicated in the incident, neither by the police, nor the loss adjusters. He was only gullible and negligent in the discharge of his duty for which his employer is now paying the price. The respondent and her husband were also not implicated in the crime.

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[8] What is the crime? Someone impersonated the respondent’s husband in order to persuade Dave Casidy to release the car to “his friend”. That seems to me to fall squarely within the definition of cheating in s. 415(a) of the Penal Code which provides as follows:

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Whoever by deceiving any person, whether or not such deception was the sole or main inducement,

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(a) fraudulently or dishonestly **induces the person so deceived to deliver any property to any person**, or to consent that any person shall retain any property; or (emphasis added).

[9] To be fair to the respondent, I would highlight also the definition of theft in the Penal Code under s. 378 which reads:

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Whoever, intending to take dishonestly any movable property out of the possession of any person without that person’s consent, moves that property in order to such taking, is said to commit theft.

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[10] From the definition above, it cannot be disputed that by taking away the respondent’s car out of the possession of the workshop’s employee, Dave Casidy, the said ‘Stephen’ had dishonestly taken the car which was entrusted to Dave Casidy at

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- A that material time but in my view it was not theft because it was taken with Dave Casidy's consent, given upon the deception played by the person who called Dave Casidy earlier to release the car to "his friend", 'Stephen'.
- B [11] Thus, the one obvious and very crucial distinction between theft and cheating is the element of deception present in the latter which is so apparent from the facts of this appeal before me.
- C [12] On this issue, the learned Sessions Court judge has considered that the appellant never pleaded cheating and/or criminal breach of trust against the respondent and/or her husband and that the evidence of the appellant's witness in the final adjuster's report which states that the loss was due to cheating were mere hearsay for the non-calling of the previous loss adjuster, the person who edited and signed the final adjuster's report, the adjuster's firm
- D director and the police inspector who investigated the police report on the loss of the car lodged by the respondent.
- E [13] The learned Sessions Court judge in his judgment said that the appellant's "allegation that a third party or stranger had conspired to commit the act of criminal breach of trust/cheating against the second defendant is merely speculation and therefore not admissible" and they have failed to prove on a balance of probability that the exception applies.
- F [14] However, later in his judgment, the learned Sessions Court judge himself found that Dave Casidy had unlawfully handed the car to a third person who was not authorized by the respondent (see his judgment at lines 10-14 of p. 201 of the appeal record).
- G [15] It is also to be noted that Dave Casidy himself gave evidence pertaining to the release of the car in line with his statement which was recorded by the loss adjuster. This affidavit appears at pp. 141-145 of the appeal record and strengthened the finding of the learned Sessions Court judge of the release of the car by him to a third
- H person.
- I [16] I believe his findings that cheating has not been proven on a balance of probability goes against the grain of the evidence which he later found, which is that the car was released by Dave Casidy unlawfully to a third party who was not authorized by the respondent which infact was done by Dave Casidy upon the

deception played by that third person. This last finding is supported by the evidence adduced at the trial, in particular that of Dave Casidy and on a balance of probability therefore the loss was due to an act of cheating by a third party.

[17] The words in the exception clause I agree is clear and unambiguous and the *contra proferentum* rule need not apply. It says “cheating/criminal breach of trust by any person ...” so the act of cheating need not be attributed to the insured only (or her husband in this case).

[18] For these reasons, I allow the appeal and set aside that part of the learned Sessions Court Judge’s decision which ordered the appellant to pay RM50,000 of the judgment sum. The second defendant in the lower court summons ie the workshop is to bear the full brunt of the judgment sum of RM94,499.80. Cost of the appeal is for the appellant to be taxed unless agreed.

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